**ROBERT CHIN KICK CHONG & ANOR.**

**v.**

**PERNAS OTIS ELEVATOR CO. SDN. BHD. & ORS.**

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID J
[CIVIL SUIT NO. K. 194 OF 1991]
13 APRIL 1992

***CIVIL PROCEDURE:*** *Injunction - Plaintiff sought injunction to require defendants to repair and reinstate lifts and not to interfere with their enjoyment of the common property - Also exemplary or aggravated damages sought - Whether very small or merely nominal damage suffered by plaintiffs will disentitle them to an injunction - Whether injunction requiring the defendants to do repairs should be granted.*

***TORT:*** *Nuisance - Whether non-repair of the lift is a nuisance - Building By-laws 1951 applicable - Interference with the reasonable enjoyment of plaintiffs' common property - Whether plaintiffs' enjoyment of common property subject to terms of sale and purchase agreement - Whether defendants under a duty to repair by covenant or law or by express reservation of right to enter for the purposes of doing repairs.*

The plaintiffs were resident-owners of apartments at the 11th floor of the condominium complex developed by the 2nd defendants. The lifts to the apartments could not be called from the 11th floor. The plaintiffs alleged that the 1st defendants by their employee or employers acting in collusion with the 4th defendant were the cause of the problem. The 2nd, 3rd and 4th defendants rejected the allegations. The first defendant stated that in order to reinstate the lift so that it can be called from the 11th floor, the damaged call button costing RM140 had to be replaced. However, the 4th defendant either declined or neglected to approve the replacement.

The plaintiffs argued that if a nuisance is due to lack of repair a defendant will be liable if he is under a duty to repair by covenant or law or if he had expressly reserved the right to enter and do repairs. Therefore they claimed an injunction against all the defendants to reinstate the lifts against 2nd, 3rd and 4th defendants from interfering with the plaintiffs' enjoyment of the common property. They also sought exemplary or aggravated damages for such interference.

The defendants disputed the argument. The 1st defendant quoted s. 54 of the Specific Relief Act 1954, to claim that the injunction should not be granted as the act complained of is not reasonably clear that it will be a nuisance. A similar argument was advanced by the other defendants as well.

The 1st defendants also claimed that they were independant contractors engaged by the 3rd defendants and there is no privity of contract between them and the plaintiff. While denying that their servants caused the lifts to be unsummonable to the 11th floor, they claimed that the injunction would cause hardship as future residents will be encouraged to demand repairs.

The 2nd, 3rd and 4th defendants claimed that the use of the common property was subjected to the terms of the sale and purchase agreement which required payment of service charges and that the plaintiffs owned a sum of RM4,700 and RM6,900 respectively, being unpaid service charges. Therefore they claimed that their refusal to replace the call button to the

lifts until the plaintiffs have fully settled their service fees was justified in law. They further submitted that such refusal can never amount to a nuisance or extortion which plaintiffs had alleged.

**Held:**

**[1]** The Building By-laws 1951 issued under the Sanitary Boards Ordinance 1931 and the Municipal Ordinance published under authority of the Government of the Colony of North Borneo was still applicable in Sabah. By-law 164(4) stipulates that such owners must arrange "preferably by a contract of maintenance with makers or suppliers of the lift for regular and adequate cleaning, oiling and adjustment service."

**[2]** A useful test for nuisance is what is unreasonable according to the ordinary usages of mankind living in a particular society or is there real interference with the comfort or convenience of living according to the standards of the average man. In this case, the damaged call button caused the lift to be unworkable and this constituted an interference with the reasonable domestic enjoyment of plaintiffs' common property.

**[3]** The Court usually should not grant an injunction requiring a defendant to do repairs. This is an exceptional and rare case. An injunction for 2nd defendant with all other defendants to have the lift repaired and reinstated was granted.

*[Injunction and Plaintiffs' costs in the cause granted.]*

**Cases referred to:**

*Heap v. Ind Coope and Allsop Ltd. [1940] 2 KB 476* ***(cit)***
*Mint v. Good [1951] 1 KB 517* ***(cit)***
*Haseldine v. C.A. Daw & Son [1941] 2 KB 343* ***(cit)***
*Cayne & Anor. v. Global Natural Resources [1984] 1 All ER 225* ***(cit)***
*Lim Chong Construction Co. Sdn. Bhd. v. Silam Quarry Sdn. Bhd. [1990] 2 CLJ (Rep) 374* ***(cit)***
*Kang Kok Kwang v. Bukit Baru Centre Sdn. Bhd. & 4 Ors. [1991] 2 CLJ (Rep) 789* ***(cit)***
*Kennaway v. Thompson [1981] 1 QB 88* ***(cit)***
*Fellows v. Fisher [1975] 3 WLR 184* ***(cit)***
*Thompson v. Park [1944] 1 KB 408* ***(cit)***
*Truckell v. Stuck [1957] 1 All ER 74* ***(cit)***
*Charrington v. Simons & Co. Ltd. [1971] 2 All ER 588* ***(cit)***
*RCA Sdn. Bhd. v. Pekerja-Pekerja Sdn. Bhd. & 15 Ors. [1991] 1 CLJ (Rep) 401* ***(cit)***
*Cyanamid (American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396; [1975] 1 All ER 504* ***(cit)***
*Leisure Data v. Bell [1988] FSR 367* ***(cit)***
*Prudential Assurance Co. v. Knott [1875] 10 Ch App 142* ***(cit)***
*White v. Mellin [1985] AC 154* ***(cit)***
*Bedfordshire County Council v. Central Electricity Generating Board [1985] JPL 43* ***(cit)***
*Sedleigh-Denfield v. O'Callaghan [1940] AC 880* ***(cit)***
*Laws & Ors. v. Florinplace Ltd. & Anor. [1981] 1 All ER 659* ***(cit)***
*Redland Bricks Ltd. v. Morris [1970] AC 652; [1969] 2 All ER 576* ***(cit)***
*Chanel Ltd. v. F.W. Woolworth & Co. Ltd. [1981] 1 WLR 485* ***(cit)***

**Legislation referred to:**

Building By-Laws 1951, By-Laws 4(1), 42, 164(4)
Contracts Act 1950, s. 52
Penal Code, ss. 383, 385
Specific Relief Act 1950, ss. 54, (g)

**Other sources referred to:**

*Torts*, Clerk & Lindsel, 15th Edn., p. 1140
*Equity*, Snell's, 29th Edn. p. 653
Supreme Court Practice 1991, Vol. 1, 29/1/4, p. 498
*Property*, Azim Mohd. Zabidi, The New Straits Times 9 April 1992

*For the plaintiffs - Ian Chin Hon Chong; M/s. Yap Chin & Tiu*
*For the 1st defendants - Kong Hong Ming; M/s. Szetu & Co.*
*For the 2nd, 3rd & 4th defendants - P.K. Lim; M/s. P.K. Lim & Co.*

**JUDGMENT**

**Syed Ahmad Idid J:**

The two plaintiffs on 7 September 1991 took out a generally endorsed writ of summons claiming, after the discontinuance of the claim for various declarations, an injunction:

(a) against all the defendants to reinstate the lifts so that the lifts can be called from the 11th Floor of the Cassia Building, Marigold Park, Jalan Kebajikan, Kota Kinabalu;

(b) against 2nd, 3rd and 4th Defendants from interfering with the plaintiffs' enjoyment of the common property: and

(c) against all the defendants for exemplary or aggravated damages for such interference.

***The Parties:***

The 1st defendants were at the relevant time and continue currently to be engaged by the 3rd defendants to maintain and repair the lifts for which they are paid RM4,920 per quarter apart from the costs of repairs. (See Exhs. "Add-7(a)" to "Add-7(f)")

The 3rd defendants, a subsidiary company of the 2nd defendants, (see Exhs. "RC12" and "RC13") and the 4th defendant are the servants or agents of the 2nd defendants and are "appointed" by the 2nd defendants to look after the common property of the housing estate. None of the 2nd, 3rd and 4th defendants are registered with the Board of Valuers, Appraisers and Estate Agents under the Valuers and Appraisers Act 1981. ("Add 1" and para. l(b) of Chin's 2nd affidavit).

***The Action***

The application was mentioned on 18 September 1991 when Counsel for the 2nd, 3rd and 4th defendants undertook to advise his clients not to interfere with the plaintiffs' use and enjoyment of the common property. The statement of claim was served on 25 September 1991. The application was again mentioned on 27 September 1991 when an undertaking was given by Counsel on behalf of the 2nd defendants not to interfere with the plaintiffs' use and enjoyment of the common property. The hearing was then adjourned to 14 November 1991.

From the outset I should say this is one of the most interesting cases that have come before me. It has been made more difficult by the opposing sides digging into their trenches and staying put, not wanting to move forward. Thus by the adamant attitude of the plaintiffs and defendants, there was a no-man's land in between. I am of the opinion that both sides could have come to an amicable settlement if their Counsel had wished so. But when Counsel decided to cite authorities in their own interests without caring to see if a middle course could be arrived at, there was a stalemate and an impasse ... and to the end the plaintiffs stuck to their grounds of application ... The defendants refused to budge. There was no willingness to negotiate or to accommodate;

The plaintiffs' application was supported by affidavits of Chin and Chong on 7 September 1991, another by Chin on 4 November 1991, and Chong on 13 November 1991. The 1st defendants served affidavits by Lo Tet Phin on 9 November 1991, Lo Hon Jin on 8 November 1991 and 12 November 1991, Alian on 8 November 1991, Jokffrey on 9 November 1991 and

Kong Hong Min on 13 November 1991. The gist of the 1st defendants' arguments was that they had contracted with the 3rd defendants to service the lifts but they were under no duty to repair or replace the parts. They could not replace the call button of the lift on 11th Floor as 3rd defendants did not approve their quotation of RM140. They denied that the button was damaged by their servants. They stated that such damage was not uncommon and they had repaired or replaced 15 call buttons in Kota Kinabalu in respect of 88 lifts maintained by them.

The 2nd, 3rd and 4th defendants filed affidavits by Chan (twice), by Petrus and by Simon Tsen all on 8 November 1991 and Simon Tsen's second affidavit on 11 November 1991. They stated that they did not allow the call button to be damaged but they will not repair the lifts until the amount said to be owing by plaintiffs are paid.

***Defences:***

(i) In short, the defences put up by 1st defendants are that:

(a) they denied that their servants had caused the lifts to be unsummonable from the 11th Floor; and

(b) there is no privity of contract between them and the plaintiffs and therefore they are not obliged to take instructions from the plaintiffs to repair the lifts; and

(c) The injunctive relief if granted would cause hardship to them in the conduct of their business. It would mean that in future the residents would be encouraged to demand repairs from them or from other independent contractors of the 3rd defendants.

(ii) And the defences of 2nd, 3rd and 4th defendants are:

(a) the plaintiffs' right to the use and enjoyment of the common property is subject to the terms of the sale and purchase agreement which the plaintiffs had signed with the 2nd defendants and subject to the payment of the service and/or maintenance charges;

(b) that the plaintiffs owed respectively the sums of RM4,700 and RM6,950 as at 30 September 1991:

(c) that they are entitled not to rectify the faults of the lifts until the plaintiffs have paid the sums owing.

(d) that they have no knowledge and did not cause or permit the disconnection of the lifts;

(e) that the 1st defendants are independent contractors for which they are not responsible if the 1st defendants had indeed caused the disconnection of the lifts; and

(f) that the state of the lifts being unsummonable from the 11th Floor does not amount to nuisance.

***The Facts of the Case:***

A condominium complex known as Marigold Park at Jalan Kebajikan, Kota Kinabalu (hereinafter referred to as the housing estate) was developed by the 2nd defendant. The housing estate has two tower blocks approved by the Kota Kinabalu Municipal Council,

each to consist of 35 apartments. One of the blocks is called Cassia Building. The apartments in each block are served by two lifts which are the common property. The other common property consists of recreational facilities and the offices at the ground floor. Occupation permits for the two blocks were issued in 1985 (See Exh. RC5) and 1990 respectively. According to the plaintiffs the 2nd defendants do not own any apartment in either block but Malaysia Assurance Alliance Bhd., which owns the entire shareholding of the 2nd defendants' company, owns 30 of the 35 apartments in one of the two blocks (See Exhs. "Add-3(e)" to "Add-3(h)").

The name of the housing estate was some time in 1990 changed from "Marigold Park" to "The Colonnades".

***The Lifts***

1st defendants in trying to extricate themselves from this debacle, contended:

(a) That they are independent contractors engaged by the 3rd defendants for after-sale service to the Otis lifts installed at the Cassia building. During both occasions on 30 August 1991 and 4 September 1991, the 1st defendants by their employees were present at the Cassia building carrying out the routine services to the said Otis lifts.

(b) That on 30 August 1991, the wiring of the call button to the lifts at 11th Floor was disconnected unlawfully as a result of which the lifts could not be called from the 11th Floor.

(c) That on 3 September 1991, the plaintiffs caused the wiring to be reconnected. (See para. 17(e) of Chin's 1st affidavit).

The lifts yet again could not be called from the 11th Floor on 4 September 1991 and up to current date. The plaintiffs alleged that the 1st defendants by their employee or employees acting in collusion with the 4th defendant were the culprits. (See para. 18(a) of Chin's 1st affidavit: Chong's affidavit). The 2nd, 3rd and 4th defendants rejected such allegation as in their opinion "it is not entirely true" because "it conveys the misleading impression that the lifts are totally out of operation and that the 1st plaintiff will have to use the stairs for the downward journey to the ground floor when in fact, residents at the 11th Floor who wish to call the lift may do so at the 10th Floor." The defendants added that both lifts at the Cassia Building were and are still functioning for the upward journeys to the 11th Floor and submitted that the damage to the call button as explained by Lo Hon Jin was fortuitous. For this reason, the defendants submitted that the plaintiffs' application for the mandatory injunction in terms of para. 1(a) above is seriously flawed and the granting of an injunction would be an exercise in futility.

***Current Situation:***

The true situation is that the lift cannot be called from 11th Floor; the lifts can go to 11th Floor from any floor between ground and the 10th Floor. In order to reinstate the lift so that it can be called from the 11th Floor, someone has to replace the call button. 1st defendants said in order to do this, there is a charge of RM140 and as the 4th defendant either declined or neglected to approve, the button is still not workable. How much will it take for the 2nd, 3rd and 4th defendants to replace the call button and reinstate the lifts? According to Mr. P.K. Lim, the plaintiffs should be made to pay RM11,650 to 2nd and 3rd defendants. Mr. P.K. Lim further recommended that the sensible and mature approach to the impasse, which can only be solved by judicial intervention, is for the Court to grant the injunction on condition

that the plaintiffs forthwith pay their arrears of contribution totalling RM11,650 to the 2nd or 3rd defendants. One can see the sensitivity on one side and the "money first" attitude on the other. A fair exchange is no robbery but was this not unreasonable?

***The Law:***

Both parties then vehemently argued on the laws. For the plaintiffs Clerk & Lindsel on *Torts*, 15th Edition., at p. 1140 defines nuisance thus:

> Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of
>
> (a) a right belonging to him as a member of the public, when it is a public nuisance, or
>
> (b) his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land, when it is a private nuisance.

Mr. Ian Chin urged upon the Court that if a nuisance is due to a lack of repair a defendant will be liable if he is under a duty to repair by covenant or by law or if he has expressly or impliedly reserved the right to enter for the purpose of doing repairs. See Clerk at p. 55. In *Heap v. Ind Coope & Allsop Ltd.* [1940] 2 KB 476, the landlord who expressly reserved himself the right of entry to do repairs was held to be under a duty of care to passers-by who used the cellar cover and was held liable for damages for negligence for want of care in the repair of the cellar collar. In *Mint v. Good* [1951] 1 KB 517, it was held that a wall in a defective condition constitutes a nuisance. In *Haseldine v. C.A. Daw & Son* [1941] 2 KB 343, it was held that the engineer who had undertaken the repair of lifts owe a duty of care to any person by whom the lifts are lawfully used to see that it has been carefully repaired.

On the other hand, the 1st defendant quoted the Specific Relief Act 1950, s. 54:

> An injunction cannot be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance.

This was also stated by the 2nd, 3rd and 4th defendants' Counsel who quoted Clerk & Lindsel where it says:

> Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous so that the question of nuisance or no nuisance is one of fact.

2nd, 3rd and 4th defendants together submitted that:

(i) their refusal to replace the call button to the lifts until the plaintiffs have fully settled their service fees is fully justified in law;

(ii) that such refusal can never amount to a nuisance or extortion which plaintiffs had alleged;

(iii) the plaintiffs are contractually bound by Clauses 29(i), (ii), (iii) and (iv) of the agreement [See Exh. "RC1(a)"] to pay and the combined effect of Clause 29 is that the plaintiffs must pay their service fees of RM250 per month if they are to benefit from the maintenance of the lifts and other common facilities;

(iv) only when plaintiffs settle such dues will there be any obligation on defendants to carry out the maintenance or repair work. Mr P.K. Lim cited s. 52 of the Contracts Act 1950, regarding reciprocal promises. In this connection, it is common practice that condominium

dwellers (like the plaintiffs here) are required to pay a monthly service (also known as management) fee. On the average, according to Azim Mohd. Zabidi writing on "Property" in the *New Straits Times* of 9 April 1992, "residents pay between 10 to 15 sen per square foot of their gross built-up area".

***Injunction***

Can the Court grant an injunction to plaintiffs? The 2nd, 3rd and 4th defendants, quoting *Cayne & Anor. v. Global Natural Resources plc* [1984] 1 All ER 225, submitted that:

(a) Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the Court should approach the case on the broad principle of what it can do in its best endeavours to avoid injustice, and to balance the risk of doing an injustice to either party: and

(b) the established guidelines requiring the Court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial; and

(c) before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction .

Other cases cited were *Lim Chong Construction Co. Sdn. Bhd. v. Silam Quarry Sdn. Bhd.* [1990] 2 CLJ (Rep) 374 and *Kang Kok Kwang v. Bukit Baru Centre Sdn. Bhd. & 4 Ors.* [1991] 2 CLJ (Rep) 789.

The learned Counsel for the defendants argued that it necessarily follows that if that duty to repair by covenant is contained in an agreement as in the instant case, the exercise of which is subject to certain prior obligations from the occupier/purchaser being first discharged, like for instance, the payment of maintenance charges, that covenant to repair cannot become operational until the maintenance charges are paid. In such situations, the failure or omission to do repair can never amount to a "nuisance" in law as the relationship of the parties are governed by contract. The defendants contended that the plaintiffs' remedies, if any, must be founded on contract and not on an action in tort for nuisance as to do so would displace the contract. Mr. P.K. Lim, asked:

> So what is the point of having a contract if the parties can avoid their respective obligations by suing in tort? Would it be equitable to allow the plaintiff to do so when he or she has expressly covenanted to be bound by the contract?

Mr. P.K. Lim stated that "the plaintiffs' allegations that the defendants had created the nuisance are devoid of credibility and defies logic as no credible developer would want to tarnish its image by creating the nuisance and especially so when the 2nd defendants has yet to implement the other phases of development in connection with the condominium project." As for the plaintiffs' allegation that the defendants have failed to abate or obviate the nuisance, the defendants in rebuttal submitted that they are completely justified in law to do so.

Now how strong is the plaintiffs' action? Even if the plaintiffs had suffered very small or merely nominal damage this will not disentitle them to an injunction. *Snell's Equity,* 29th Edition, at p. 653 [139] states:

> The fact that the plaintiff has suffered very small or merely nominal damage will not disentitle him to an injunction. If the law were otherwise, the plaintiff might be left to bring action after action to recover damages ... Indeed, that the damage is trifling may be the very reason why an injunction should be granted.

In cases of continuing nuisance, an injunction will normally issue. See *Kennaway v. Thompson* [1981] 1 QB 88, at p. 92-93.

The usual purpose of an interlocutory injunction is to preserve the "*status quo*" which is the state of affairs existing during the period immediately preceding the issue of the writ.

This begs the question - "before what period of time?" The point of time varies from case to case In *Fellows v. Fisher* [1975] 3 WLR 184 Sir John Pennycuick at p. 199-200, (cited in Golderin at p. 94) states:

> By the expression '*status quo*' I understand to be meant the position prevailing when the defendant embarked on the activities sought to be restrained.

See *Thompson v. Park* [1944] 1 KB 408 (cited in Golderin at p. 93 for an illustration of the meaning of "*status quo*"). It is therefore safe to take the point of time as that when all the lifts were in working order before unknown dark hands got to damage the call buttons.

The plaintiffs then went on to deal with the Factories and Machineries Act 1967, Valuers & Appraisers Act 1981, and the Penal Code s. 385. The learned Counsel for the defendants argued on each point. But all three Counsel neglected to introduce a quaint set of by-laws - The Building By-laws 1951 issued under the Sanitary Boards Ordinance 1931 and the Municipal Ordinance published under authority of the Government of the Colony of North Borneo which, I am given to understand, is still applicable in Sabah. I describe the by-laws as quaint as it also deals with pail latrines and it goes on to provide that such

(i) pail latrines "shall be of a pattern approved by the chairman"; and

(ii) the pail "must be so placed that all excreta shall fall directly into it "and such other specifications including the size of the hole in the seat.

But having said that, as the By-laws continue to be applicable in Kota Kinabalu, I have to refer to By-law 164(4):

> Every lift and hoist and any mechanism connected therewith shall be kept by the owner of the building in which such lift or hoist is installed in good order and repair and efficient working order.

The by-laws also stipulate that such owner must arrange "preferably by a contract of maintenance with the makers or suppliers of the lift ... for regular and adequate cleaning, oiling, and adjustment service ...". By-law 42 states that the owner of any building ..."to repair ...". By-law 4(1) provides for penalties of RM500 fine and in the case of a continuing offence to a fine of RM10 per day.

Very exceptionally an injunction may be mandatory, requiring an act to be done. On the facts before me, I am of the opinion that:

(i) the plaintiff has a good arguable claim to the right he seeks to protect;

(ii) there is a serious question to be tried;

(iii) and upon the balance of convenience, it is only proper that the defendants, either singly or all in concert, should replace the call button and repair the lifts in the Cassia building to make them all workable for the use and benefit of the plaintiffs, their guests and

licensees and other tenants. Residents of condominium can expect a host of services to be provided such as 24 hour security, maintenance and cleaning of facilities (swimming pool, sauna, squash Courts), payment of electricity charges for all common areas and eradication of dangers and health hazards.

I am aware that the Court usually should not grant an injunction requiring a defendant to do repairs. See: *Truckell v. Stuck* [1957] 1 All ER 74; *Charrington v. Simons & Co. Ltd.* [1971] 2 All ER 588. I have found that the affidavit evidence was sufficient despite defendants' strong attempts to discredit the plaintiffs. This is an exceptional and rare case to quote Held 2(b) *RCA Sdn. Bhd. v. Pekerja-Pekerja RCA Sdn. Bhd. & 15 Ors* [1991] 1 CLJ (Rep) 401.

The *Cyanamid (American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396, [1975] 1 All ER 504 HL) guidelines are not relevant to mandatory injunctions. I know that the case has to be unusually strong and clear before a mandatory injunction will be granted. But the interests of society will be served if the mandatory order is made *Ad Interim* whether or not the high standard of probability of success at the trial is made out (*Leisure Data v. Bell* [1988] FSR 367).

Way back between 1875 and 1895, it was held that the High Court had no jurisdiction to prevent the commission of acts which were merely criminal or illegal. See *Prudential Assurance Co. v. Knott* [1875] 10 Ch App 142; *White v. Mellin* [1985] AC 154. But the current thinking has changed and it seems to me an injunction can be granted to restrain an anticipated breach of the criminal law where the breach would be flagrant and deliberate or might do real harm. The *Supreme Court Practice 1991* Vol. 1, 29/1/4 at p. 498. See *Bedfordshire County Council v. Central Electricity Generating Board* [1985] JPL 43.

It is material to my decision whether more harm will be done if I do not grant this injunction. In other words, if I refuse, then the lift remains uncallable from the 11th Floor and the plaintiffs will not be able to use it. They will suffer ignominy. Guests and others will look at them in disbelief and say: "How can you live in this housing estate, pay RM430,000 (the purchase price) and yet you cannot even call the lift. What a nuisance." A landowner may be sued in nuisance if he continues or adopts it by failing to take reasonable steps to end it after he has knowledge of it. See: *Sedleigh-Denfield v. O' Callaghan* [1940] AC 880.

Mr. P.K. Lim has high regards for the defendants, calling them "credible developer". What type of developer is this whose building is not properly managed and it breaches the law?

Happily for it, the Kota Kinabalu Municipal Council and the other authorities do not seem to be concerned. There is no proof the authorities have acted (or will act) to punish the developer and his agents. The common people like the plaintiffs then have to look to the Courts for some relief or remedy.

I am unable to accede to defendants' Counsel's suggestion that the injunction cannot be granted because I am of the firm view that the non-repair of the lift on the 11th Floor is a nuisance. Section 54(g) of the Specific Relief Act 1950, is inapplicable under these circumstances. I am fortified by an article in the *New Straits Times* entitled "Condominium owners must change their views towards service charges" where the writer stated:

> As long as the property developer is still responsible for the management of the condominium, residents can be rest assured that the provision of the services by the condominium development is met. Irrespective of whether the unit owners/residents effect their periodic payment of the service fees, the management company, which is usually either a subsidiary or a division of the development company, has to employ sub-contractors to provide the services in the first place.

The list of acts which can be termed a nuisance cannot be closed. It opens with each new or innovative act which causes harm or annoyance to others. No precise or universal formula is possible but a useful test is what is unreasonable according to the ordinary usages of mankind living in a particular society or is there real interference with the comfort or convenience of living according to the standards of the average man. It could not be a coincidence that when the plaintiffs took up the cudgels on their own behalf regarding several issues with which they were not satisfied with the acts of the 2nd or 3rd defendants, then their lift ceased to work. Surely the Cassia Building is not under a Jinx? There must be evil hands about. The conduct of the defendants jointly or in combination leaves much to be desired. 1st defendant stated they were ready to repair the call button but the 4th defendants declined to approve the RM140 required. While I cannot go along with plaintiffs' contention that the defendants are extortioners, the defendants by their act come close to it. Mischief appears to be more closely associated with what had occurred when the call button on 11th Floor was damaged.

An injunction was granted in *Laws & Ors. v. Florinplace Ltd. & Anor.* [1981] 1 All ER 659. That case concerns call girls. Our case concerns call button. The call girls "constituted an interference with the reasonable domestic enjoyment of the (plaintiff's) property." In our case, the damaged call button caused the lift to be unworkable and this constituted an interference with the reasonable domestic enjoyment of plaintiffs' common property in the housing estate.

The Court in granting a mandatory injunction must ensure that the defendants know exactly what, as a matter of fact, they have to do so that they can give their contractors the proper instructions. *Redland Bricks Ltd. v. Morris* [1970] AC 652 [1969] 2 All ER 576.

On 27 September 1991, Colonnade Properties Sdn. Bhd. gave a written undertaking that they and their servants or agents will not interfere with the enjoyment by the plaintiffs of the common property of the Colonnades (formerly known as Marigold Park) in accordance with the prayer at para. 1(b). The undertaking was effective "until the hearing of the plaintiffs application".

As a Court of conscience, one must take such undertaking into account in deciding whether to grant or refuse an injunction. The readiness of the 2nd defendant to give the undertaking is something this Court appreciates. According to the letter, the undertaking includes the 3rd and 4th defendants who were the property manager and an, employee respectively (and the Court accepts that 1st defendant is also part of the undertaking as they are agents of 2nd defendant). It appears to me that the continuation of the undertaking is appropriate. See: *Chanel Ltd. v. F.W. Woolworth & Co. Ltd* [1981] 1 WLR 485.

As for 1st defendant, I can only echo what Goddard LJ said at p. 378 in the case of *Haseldine v. C.A. Daw & Son Ltd. & Ors.* [1941] 2 KB 343:

> If the repairers do their work carelessly or fail to report a danger of which they as experts ought to be aware, I cannot see why the principle of *Donoghue v. Stevenson* [1932] AC 562 should not apply to them.

Upon these grounds, I think that the law as it stands permit me to give effect to commonsense and decency and to grant:

(i) the injunction as in prayer (a), that is, for 2nd defendant in conjunction or combination with any or all of the other defendants, 3rd and 4th and 1st to have the call button at the 11th Floor repaired and to reinstate the lifts so that they work normally; and

(ii) as the 2nd defendant has given an undertaking, I order such undertaking as embodied in their letter of 27 September 1990 and in the spirit of prayer (b) be continued and if no such undertaking is given within a week, then I grant the injunction as in prayer (b); and

(iii) Plaintiffs costs in the cause.

Also found at [1992] 4 CLJ 1907